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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2024

ROBERT WARTH, et al.,

Petitioners,

v.

IRA SELDIN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

J. HAROLD FLANNERY
PAUL R. DIMOND
WILLIAM E. CALDWELL
Lawyers' Committee for
Civil Rights Under Law
733 - 15th Street, N.W.
Suite 520
Washington, D.C. 20005
Attorneys for
Lawyers' Committee for
Civil Rights Under Law

Washington, D.C. • THIEL PRESS • (202) 638-4521

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BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

INTEREST OF *AMICUS CURIAE**

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963 following a conference of lawyers called at the White House by President John F. Kennedy. The Committee's mission was to help transfer the process of decision on minority Americans' claim for equal justice from violent repression in the streets

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*Both the petitioners and the respondents have consented to the filing of this brief. Copies of their letters have been filed with the Clerk.

to civil hearing on the merits in federal courts. The Lawyers' Committee remains a nonprofit private corporation whose principal purpose is to involve private lawyers throughout the country in the struggle to assure all citizens of their civil rights through legal process. The Board of Trustees of the Committee includes eleven past presidents of the American Bar Association, three former Attorneys General, and two former Solicitors General.

The Lawyers' Committee and its local committees, affiliates, and volunteer lawyers have been actively engaged in providing legal representation to those seeking relief under federal civil rights legislation and the Reconstruction Amendments to the Constitution. Such litigation includes cases raising housing discrimination issues similar to those presented in the complaint in this case. See, e.g., *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970). Our interest in this case, however, involves the most basic concern of the Lawyers' Committee: the right of minority Americans to have their claims for civil rights under federal law adjudicated on the merits in federal court. With this Supreme Court, we " '. . . believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication. . . .' "[1]

The instant case presents, *inter alia*, a challenge under the Fourteenth Amendment and the post-Civil War civil rights acts to discriminatory government action based on race: the alleged exclusion of minority-race citizens from residence in a community by the discriminatory action of respondent public officials. The court of appeals has held, however, that those who are the objects

[1] *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

of such alleged government discrimination, as well as their representatives who are secondarily affected, do not have "standing" in the federal courts to present the challenge. That ruling, in our judgment, constitutes an unwarranted expansion of this Court's "rule of self-restraint"[2] which is inimical to the congressional purposes and national policy underlying most, if not all, of the substantive and jurisdictional civil rights legislation. Because *amicus* believes that the federal courts "are not at liberty to seek ingenious analytical instruments"[3] for evading congressionally-mandated civil rights jurisdiction, we have a vital interest in this case which is broader than that of the immediate litigants. The Lawyers' Committee therefore files this brief as friend of the Court urging reversal.[4]

STATEMENT OF THE CASE

Petitioners invoked the jurisdiction of the district court under 28 U.S.C. §§1331 and 1343 seeking declaratory (28 U.S.C. §2201) and injunctive relief, and money damages, for alleged violations of 42 U.S.C. §§1981, 1982 and 1983, and the First, Ninth and Fourteenth Amendments to the Constitution. Reading petitioners' complaints with the liberality required by federal practice, and as elaborated by the affidavits filed in opposition to respondents' motion to dismiss,[5] peti-

[2] *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

[3] *United States v. Price*, 383 U.S. 787, 801 (1966).

[4] We do not, however, take a position on petitioners' claim of standing as taxpayers, as we conclude (part III, *infra*) that the Court need not and should not reach that issue.

[5] It is, of course, appropriate for this Court to look, as did the court of appeals, to the affidavits filed in opposition to respondents' motion to dismiss. *Cf. Willingham v. Morgan*, 395 U.S.

[footnote continued]

tioners charge respondents[6] with adopting and manipulating the residential zoning laws of the town of Penfield, Monroe County, New York, for the successful purpose of excluding racial minorities and the poor from residing in the town. The courts below held that none of the petitioners have standing to sue.[7] The status of petitioners is therefore at the heart of this controversy in its present posture. We divide petitioners into three categories.

1. *Non-White Petitioners.* Petitioners Ortiz, Broadnax, Reyes and Sinkler (hereafter "non-white petitioners") are non-white persons[8] residing in or around the city of Rochester, New York who desire to reside in the adjacent Town of Penfield through the purchase or rental of real property. Three of these petitioners live in ghetto conditions in the central city area of Rochester in deplorable housing and an otherwise unsuitable environment. Each petitioner has attempted, but has been unable, to secure affordable housing in the town of Penfield. (A. 362-77, 404-21, 422-29, 435-53). In addition, in the recent past petitioner Ortiz worked in the town of Penfield but, because of his inability to find housing, was forced to live over 40 miles from his job and incur

402, 407 n.3 (1969). Respondents did not move for summary judgment, nor have they otherwise challenged the complaint and affidavit allegations in support of standing. *Cf. United States v. SCRAP*, 412 U.S. 669, 689-90n.15 (1973).

[6] Respondents are the Town of Penfield and the respective members of its Town Board, Planning Board and Zoning Board.

[7] The district court's order of dismissal is unreported and appears at pages 1-4 of Appendix B to the petition for certiorari (hereafter, "Pet. App."). The Second Circuit's opinion is reported at 495 F.2d 1187, and appears in Pet. App. A at 1-16.

[8] Two of these petitioners are Negroes, one is Puerto Rican and one is of Spanish/Puerto Rican extraction.

substantial commuting expenses. (A. 366-71). The non-white petitioners allege that they are unable to reside in Penfield because of that town's zoning policies and practices which have the exclusion of non-whites and the poor as their purpose and effect. (A. 17-29, 362-64, 404-06, 422-24, 435-37.

2. *Organizational Petitioners.* Petitioner Metro-Act of Rochester, Inc. (hereafter "Metro-Act") is a New York nonprofit corporation having its principal office in Rochester. Metro-Act was founded in 1965 following Rochester's 1964 "race riots," the product of longstanding policies and practices of racial discrimination against blacks and other minorities in such areas of daily life as housing, education, employment and community services. (A. 181-82). Metro-Act has approximately 350 members (9% of whom live in Penfield) whose organizational purposes include seeking open (non-discriminatory) housing in suburban areas of Rochester. (A. 183-85). Petitioner has advocated zoning changes to eliminate racial and economic barriers and has conducted formal studies of housing needs in the Rochester metropolitan area; it has made low- and moderate-income housing proposals to various suburban towns, including Penfield; and, in particular, prior to the institution of this lawsuit Metro-Act's housing task force and other of its officers met with Penfield's town leaders on several occasions, culminating in an open housing proposal by Metro-Act which died of frustration. (A. 185-95).

Petitioner Rochester Home Builders Association, Inc. (applicant for intervention in the district court) (hereafter "Home Builders") is a New York nonprofit corporation whose organizational purposes, among others, are to act as a nonprofit trade association representing persons and companies engaged in the construction and development (and ancillary activities) of residential hous-

ing in the Monroe County area, to foster and promote the housing industry, to promote civic development and secure even and just taxation, and to promote and encourage the provision of adequate housing for all members of the community. (A. 139-43). Its principal office is in Rochester; 110 of its members are engaged in the construction of housing (sale and/or rental); 10% of its members have constructed housing in Penfield; and, except for government-constructed units, its members are responsible for over 80% of the single-family homes and 90% of the multi-family units constructed in Monroe County in the last 15 years. Petitioner's members have also constructed over 80% of the private housing built during the last 15 years in Penfield. (A. 145-47). The attempts of petitioner's members and others to construct low- and moderate-income housing in Penfield have been frustrated by respondents' actions, thereby depriving petitioner's members of substantial business opportunities and profits. (A. 154-57). Moreover, respondents have threatened to retaliate against Home Builders and its members for becoming involved in this litigation. (A. 158-59).

Petitioner Housing Council in the Monroe County Area, Inc. (added plaintiff in the district court) (hereafter "Housing Council") is a nonprofit corporation having its principal office in Rochester. It was organized in response to a 1970 study of housing conditions in Monroe County prepared by the Rochester Center for Governmental and Community Research for the Metropolitan Housing Committee (sponsored jointly by the governments of Rochester and Monroe County). (A. 170-71). Petitioner's purposes, generally, are to provide assistance and leadership in combating community deterioration and eliminating racial and economic discrimination and prejudice in housing. Housing Council's membership consists of 71 public and private organizations having interests in housing; 17 of them are or hope to be involved in the development and construction of low- and middle-income housing; 1 member, Penfield Better Homes Corp., is and has been actively attempting to develop housing in Penfield to meet the demands of low-income persons, but has been "stymied" in such efforts by respondents. (A. 171-74). Some of Housing Council's members are local government agencies with direct interests in the provision of low- and middle-income housing; a majority of its member groups have memberships composed primarily of minority and poor people. (A. 174-75).

3. *Taxpayer Petitioners.* Petitioners Warth, Reichert, Vinkey and Harris are resident-citizen property owners of Rochester who, as a result of respondents' discriminatory policies and practices, have to pay a disproportionate share of real estate taxes to the city of Rochester because Rochester has to assume more than its fair share of tax-abated housing projects to meet the demands of low- and moderate-income people in the metropolitan area. (A. 3-6, 456-86).

The district court, on respondents' motion to dismiss or for a more definite statement and for an order denying class action status to the suit, held that (1) all petitioners are without standing to sue, (2) petitioners have stated no claims upon which relief can be granted, and (3) the suit should not be treated as a class action. The court of appeals affirmed on the exclusive ground that petitioners lack standing.[9]

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[9] Although the district court dismissed the complaint for failure to state a claim, which constitutes a determination on the merits (*see Bell v. Hood*, 327 U.S. 678, 682 (1946)), the court

[footnote continued]

SUMMARY OF ARGUMENT

First, this action presents a clear "case or controversy" under Article III of the Constitution. Although not specifically referred to in their pleadings for either jurisdictional or cause-of-action purposes, petitioners' allegations state claims over which the district court has jurisdiction under § 812 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612. The court of appeals erred, therefore, in not deciding the standing questions according to the principles announced in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), under which standing is confined only by Article III case-or-controversy requisites. The non-white and organizational petitioners thus have standing under Title VIII, which also entitles them to litigate their other federal claims.

Second, by the post-Civil War civil rights legislation Congress also intended to define standing as broadly as is constitutionally permissible, particularly for challenges to

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of appeals passed only on the standing issues, quite properly recognizing that "[i]t would not be necessary to decide whether appellants' allegations . . . will, ultimately, entitle them to any relief, in order to hold that they have [or lack] standing to seek it." *Baker v. Carr*, 369 U.S. 186, 208 (1962). See also *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). Our view of the standing questions thus requires a remand to the court of appeals for further proceedings. It does not seem inappropriate, however, to note that, upon any fair reading of the complaints and affidavits of record, it cannot now be said that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957). While all of petitioners' claims are substantial and entitled to determination on their merits, it is the racial discrimination claims "to which we direct our most careful attention. For while the law with regard to classifications based on wealth may still be in a state of flux, it cannot now be doubted that under our Constitution, distinctions in treatment based on race are inherently suspect." *United Farmworkers v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974).

government-sponsored discrimination. 42 U.S.C. § § 1981, 1982 and 1983, as well as the civil rights jurisdictional grants, 28 U.S.C. § § 1331 and 1343, which are designed to keep the promises of the Thirteenth and Fourteenth Amendments, thus mandate broad standing rules. This Court has recognized as much in a long line of land use discrimination cases finding third-party standing.

The standing questions in this case must therefore be decided in harmony with the liberal rules enunciated in *Trafficante* and the Administrative Procedure Act cases (e.g., *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *United States v. SCRAP*, 412 U.S. 669 (1973)); for the civil rights statutes involved here deserve no less respect.

Thus, the non-white petitioners, who claim in essence that they are excluded from residing in the Town of Penfield and are confined to a state-imposed ghetto for which respondent state officers and instrumentalities bear partial responsibility, have clearly alleged "injury in fact." And, just as clearly, their claims fall within the "zone of interests" protected by the relevant statutes and constitutional provisions. Failure to accord standing to these petitioners would result in a degree-of-discrimination test for standing which would immunize from judicial review those modes of discrimination which are most successful.

Similarly, the organizational petitioners also have standing, although their injury is secondary and accrues primarily through their members. While their standing should be established by this Court's decisions in *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *United States v. SCRAP, supra*, their standing is mandated, as it will frequently be in cases of this nature, by the prin-

ciples of *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) and *NAACP v. Alabama*, 357 U.S. 449, 458-60 (1958).

Finally, litigation of the claims of the non-white and organizational petitioners will effectively vindicate the claims and interests of the taxpayer petitioners. It is therefore unnecessary to decide whether the latter have standing, in the context of this case, to sue as taxpayers.

ARGUMENT

I.

THE NON-WHITE AND ORGANIZATIONAL PETITIONERS HAVE STATED A "CASE OR CONTROVERSY" UNDER ARTICLE III; THEY THEREFORE HAVE STANDING UNDER TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968.

A. A "Case or Controversy" Is Present.

The threshold inquiry, as in all of this Court's standing decisions, is whether the non-white and organizational petitioners "have the personal stake and interest that impart the concrete adverseness required by Article III." *Barlow v. Collins*, 397 U.S. 159, 164 (1970). As to the non-white petitioners, the court of appeals, relying on this Court's decision in *O'Shea v. Littleton*, 414 U.S. 488 (1974), found their "personal connection" with the allegations of wrongful conduct on the part of respondents "too abstract, conjectural, and hypothetical to establish an Article III case or controversy." (Pet. App. A at 12). That conclusion misunderstands the record and misapplies *O'Shea*.

Aside from the obvious distinction that *O'Shea* involved requests for injunctive relief against the conduct

of judicial officers in criminal proceedings (and the additional justiciability and equity-jurisprudence issues thereby raised),[10] the critical difference is that none of the plaintiffs in *O'Shea* was "identified as having himself suffered any injury in the manner specified." 414 U.S. at 495. That is, none of them had been subjected to the alleged discriminatory bond-setting, sentencing and jury-payment practices. In the instant case, by contrast, it is charged that respondents have excluded housing for low-income people from Penfield for the purposes of racial and economic discrimination. The non-white petitioners, who are also poor, allege that they have sought but been unable to find housing within their means in Penfield *because of respondents' discriminatory policies and practices.* The result, they allege, is confinement to a ghetto environment without access to decent jobs, decent housing, adequate education for their children and recreational facilities. They allege more than the mere stigma of racial discrimination, although we should think that that would be enough. *Cf. Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Manifestly, these petitioners allege that they *themselves* have "suffered . . . injury in the manner specified."

The court of appeals, while frequently fusing case-or-controversy and standing considerations, did not expressly hold that the organizational petitioners had failed to meet Article III requirements. We think it clear, in any event, that these petitioners have stated a "case or

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[10] The Court noted that its "reluctance to interfere with the normal operation of state administration of its criminal laws in the manner sought by respondents strenghtens the conclusion that the allegations in this complaint are too insubstantial to warrant federal adjudication of the merits of respondents' claim." 414 U.S. at 498-99.

controversy." They allege that respondents' conduct has frustrated their respective organizational purposes; that all or some of their members have been directly affected in the same manner as the non-white petitioners; and that some of their members have been secondarily affected by the loss of business opportunities attendant upon respondents' frustration of construction and development of lower-income housing. As will be elaborated further in later parts of this brief discussing organizational standing (*see* Parts IC and II B 2, *infra*), these petitioners meet Article III requirements. *Cf. Allee v. Medrano*, 92 S. Ct. 2191, 2202n.13 (1974); *id.* at 2207 (Burger, C. J., concurring and dissenting).

In sum, for present purposes, the non-white and organizational petitioners have alleged "[t]he important [Article III] ingredient . . . [of] governmental activity directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974). They have sufficient interest in challenging the statute's validity [as well as its application] to satisfy the 'case or controversy' requirement of Article III of the Constitution." *Eisenstadt v. Baird*, 405 U.S. 438, 444 (1972). Their claims are "presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101 (1968).[11] *See generally, Village of Belle Terre v. Borass*, 416 U.S. 1 (1974); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Flast v. Cohen, supra*,

[11] Because "standing" rules are designed to insure the case-or-controversy strictures of Article III (*Barrows v. Jackson*, 346 U.S. 249 (1953)), it necessarily follows that if a petitioner has standing, he has met Article III requirements. Hence, our discussions of standing, as such, which follow will provide additional support for the conclusion in text that petitioners' claims constitute a case and controversy.

392 U.S. at 94-101; *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 229, 240-41 (1937).

B. Petitioners' Allegations State Claims Under Title VIII of the Civil Rights Act of 1968; the Standing Questions Should Therefore be Decided Under Title VIII.

Section 804 of the Civil Rights Act of 1968 makes it unlawful, *inter alia*, "to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color . . . or national origin" and "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color . . . or national origin." 42 U.S.C. § § 3604(a) and (b) (emphasis added). In addition, § 815 provides that

> any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

42 U.S.C. § 3615. Petitioners' allegations in the instant case—that respondents, for the purpose of excluding non-whites, have refused to make available lower-income housing in the town of Penfield—thus state colorable claims under Title VIII. *See, e.g., Parkview Heights Corp. v. City of Blackjack*, 467 F.2d 1208 (8th Cir. 1972); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F.Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *United States v. City of Parma*, P.H.E.O.H. Rptr. ¶ 13,616

(N.D. Ohio Sept. 5, 1973). The district court has jurisdiction of these claims under § 812, 42 U.S.C. § 3612.

Although petitioners do not explicitly refer to Title VIII as a basis for jurisdiction, the court of appeals should have nevertheless decided the standing issues—which, if not technically jurisdictional in nature, have clear jurisdictional overtones—under Title VIII and this Court's decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). To have done otherwise was to adhere to "wholly outmoded technical pleading rules. . . ." *Bowers v. Campbell*, ____ F.2d ____ n.2 (9th Cir. October 24, 1974) (cause of action stated under 42 U.S.C. § 1981 although the statute was not cited in the pleadings). We therefore urge this Court to treat petitioners' pleadings and affidavits as making colorable Title VIII claims. *See Willingham v. Morgan*, 395 U.S. 402, 407n.3 (1969); 28 U.S.C. § 1653.[12]

C. Petitioners Have Standing Under Title VIII and Trafficante, Which Also Entitles Them to Litigate Their Other Federal Claims.

In *Trifficante v. Metropolitan Life Ins. Co., supra*, this Court held that the Title VIII definition of "person aggrieved" (§ 801(a), 42 U.S.C. § 3610(a)) "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" 409 U.S. at 209 (quoting *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3d Cir. 1971)). The Court rejected a lower court holding that allowed standing "only by persons who are the objects of discriminatory housing

[12] 28 U.S.C. § 1653 provides: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." *See generally*, 7B *Moore's Federal Practice* § 1653 (2d ed. 1973); 3 *Moore's Federal Practice* ¶15.08 [2] (2d ed. 1972).

practices," and held that white tenants of a housing complex have standing to challenge their landlord's racially discriminatory policies and practices. The Court found "injury in fact" from "the loss of important benefits from interracial associations." 409 U.S. at 210. Noting that "the language of the Act is broad and inclusive" (*id.* at 209), and that Congress' intent was "to replace the ghettos 'by truely integrated and balanced living patterns.' 114 Cong. Rec. 3422" (*id.* at 211), the Court emphasized the role of "private attorneys general"

> in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects "the very quality of their daily lives."

Id. (quoting from *Shannon v. HUD*, 436 F.2d 809, 818 (3d Cir. 1970)).

The instant case is much easier, at least as to the non-white petitioners, for even under a narrow construction of Title VIII they are among "those against whom a discrimination is directed . . ." and their "injury in fact" is even greater and much more concrete than "the loss of important benefits from interracial associations." The injury which these petitioners allege is, in fact, more ominous than the impairment of "the very *quality* of their daily lives"—it is, in a very real sense, their and their children's *lives* which are at stake.[13]

The organizational petitioners are also "persons aggrieved" who have standing under Title VIII and *Trafficante*.[14] Congress defined "person" broadly to include

[13] One of the petitioners, for example, keeps the bedroom light on all night to prevent the rats and mice from biting her children. (A. 411-12).

[14] Jurisdiction in *Trafficante*, where the federal civil action was preceded by a complaint to the Secretary of HUD under 42 U.S.C.

[footnote continued]

> one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

42 U.S.C. §3602(d). This definition appears to be all-inclusive (*see United States v. City of Parma*, P.H.E.O.H. Rptr. ¶13,616 (N.D. Ohio Sept. 5, 1973)) and these petitioners have alleged injury in fact just as surely as those in *Trafficante* who claimed the loss of associational benefits.

It appears to be immaterial whether petitioner Metro-Act, as a "private attorney general," is deemed to have standing because its members who live in Penfield are "aggrieved" by the deprivation of "interracial associations," or whether it is "aggrieved" by the fact that some of its non-Penfield members who seek housing in Penfield are the objects of respondents' discriminatory activities.[15] And it would also seem that Congress' inclusion of a broad range of non-individuals in the definition of "person," coupled with Metro-Act's vital interest in open housing and the refusal of Penfield to consider a Metro-

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§3610(a), was based on 42 U.S.C. §3610(d); whereas jurisdiction in the instant case is based on 42 U.S.C. §3612, since no administrative complaint was filed. The allegations here, which are concerned with an ongoing course of discriminatory conduct (*cf. Baker v. F. & F. Investment Corp.*, 420 F.2d 1191, 1200 (7th Cir. 1970)), are clearly timely filed under §3612. The absence of any reference in §3612(a) to the party who may sue, merely serves to demonstrate that the "person aggrieved" definition of §3610(a) applies to §3612 cases as well.

[15] The court of appeals considered *Trafficante* in connection with Metro-Act, but held it inapplicable. (Pet. App. A. at 13). The court also denied representative standing to Metro-Act because of its earlier determination that non-white petitioners lack standing. (Pet. App. A. at 12).

Act low-income housing proposal, are sufficient to give Metro-Act "person aggrieved" standing under the broad provisions of Title VIII. *Cf. Sierra Club v. Morton*, 405 U.S. 727 (1972); *United States v. SCRAP*, 412 U.S. 669 (1973). Petitioners Home Builders and Housing Council are on even stronger ground, as some of their members have suffered actual economic loss.

Most conclusive on the Title VIII standing status of all three organizational petitioners, however, is Congress' explicit intent to encourage all "persons," including corporations, associations, and the like, to become private-attorney-general participants in converting the statutory promises into reality—i.e., "to provide, within constitutional limitations, for fair housing throughout the United States." §801, 42 U.S.C. §3601. The organizational petitioners are so acting; therefore, by statutory definition as "persons" who are protected by Title VIII, they have standing to sue thereunder.[16]

In view of petitioners' standing under Title VIII, the need for this Court to determine independently their standing to present the other federal statutory and con-

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[16] Furthermore, as added encouragement to such participation, Congress in §817 has made it unlawful "to coerce, intimidate, threaten, or interfere with any person . . . on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right guaranteed or protected by" Title VIII. 42 U.S.C. §3617. The organizational petitioners, through their various efforts to construct housing in Penfield for lower-income individuals and to get Penfield to modify its policies, have "aided or encouraged" non-white petitioners and others in the attempted exercise of rights secured by Title VIII. In addition, petitioner Home Builders alleges that Penfield officials have threatened retaliatory action against it and its members for becoming involved in this litigation. This petitioner has thus stated a basis for jurisdiction directly under §817: "This section may be enforced by appropriate civil action."

stitutional claims is eliminated. All of petitioners' claims arise out of the same factual context and constitute a single case, *see Hagans v. Lavine*, 415 U.S. 528 (1974). If they have standing to litigate one of their statutory claims, judicial economy and fairness mandate trial of the entire case.

Should the Court nevertheless decide to reach the question left open in *Trafficante* (409 U.S. at 209n.8), we present the following alternative argument.

II.

THE POST-CIVIL WAR CIVIL RIGHTS LEGISLATION IS DESIGNED, AT A MINIMUM, TO ERADICATE, THROUGH THE FEDERAL COURTS, STATE-SUPPORTED RACIAL DISCRIMINATION WHEREVER AND HOWEVER IT MAY OCCUR; STANDING TO SUE UNDER THESE STATUTES MUST BE LIBERALLY CONFERRED WITHIN THE CONFINES OF ARTICLE III; PETITIONERS HAVE STANDING TO SUE UNDER THESE STATUTES.

A. 42 U.S.C. §§1981, 1982 and 1983, and 28 U.S.C. §§1331 and 1343, are Broad and Inclusive as to Petitioners' Racial Discrimination Claims.

42 U.S.C. §§1981 and 1982 have their origins in §1 of the Civil Rights Act of 1866 (enacted pursuant to the Thirteenth Amendment), which "was cast in sweeping terms." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968). *See also Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439n.11 (1973). §§1981 and 1982 guarantee to all persons and citizens "the same right in every state and territory to," among other things, "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property," and "to inherit, purchase, lease, sell, hold

and convey real and personal property," "as is enjoyed by white citizens." The intended breadth of these statutes is revealed by the legislative history of the 1866 Civil Rights Act which is catalogued in this Court's opinion in *Jones v. Alfred H. Mayer Co., supra*, holding that "§1982 bars *all* racial discrimination, private as well as public, in the sale or rental of housing. . . ." 392 U.S. at 413. §1 of the 1866 Civil Rights Act "was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute. . . ." *Id.* at 426. And, although "its language was far broader than would have been necessary to strike down discriminatory statutes" (*Id.* at 426-427), §1982 was also intended to deal with "the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns. . . ." *Id.* at 428.[17] It was designed to secure "the right to acquire property" (*Id.* at 432),[18] and its guarantees are violated "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin. . . ." *Id.* at 442-43. It promises "the right to live wherever a white man can live" (*Id.* at 443), and its application is universal. *District of Columbia v. Carter*, 409 U.S. 418, 422 (1973). §1981, having the same origins, has a similar sweep. *Tillman v. Wheaton-Haven Recreation Ass'n, supra*, 410 U.S. at 440-41.

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[17] The Court observed that "opponents of the bill [1868 Act] charged that it would not only regulate state laws but would directly 'determine the persons who [would] enjoy . . . property within the States,' threatening the ability of white citizens 'to determine who [would] be members of [their] communit[ies]. . . .' " 392 U.S. at 433.

[18] *Accord, Tillman v. Wheaton-Haven Recreation Ass'n, supra*, 410 U.S. at 537; *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1972). The Fourteenth Amendment also protects, against state action, "the rights to acquire, enjoy, own and dispose of property." *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

Jurisdiction to enforce the provisions of §§ 1981 and 1982 is broadly conferred upon the district courts; they are mandated to entertain civil actions "authorized by law to be commenced by any person" suffering deprivations.[19]

Similarly, 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), initially passed pursuant to the Fourteenth Amendment in the post-Civil War era as part of § 1 of the Civil Rights Act of 1871, while limited by the "state action" concept,[20] is also to be accorded a sweep as broad as its language. With particular relevance to the instant case, this Court has concluded, in *Lynch v. Household Financo Corp.*, 405 U.S. 538, 543 (1972), that

> the Congress that enacted the predecessor of §§ 1983 and 1343(3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law.

See generally, Steffel v. Thompson, 415 U.S. 452 (1974); *District of Columbia v. Carter, supra; Mitchum v. Foster*, 407 U.S. 225 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Blue v. Craig*, ____F.2d ____(4th Cir. 1974). *Cf. Griffin v. Breckenridge*, 403 U.S. 88 (1971).

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[19] 28 U.S.C. §1343 and subsections (3) and (4), 28 U.S.C. §1331(a) also confers jurisdiction for claims under §§ 1981 and 1982, although a jurisdictional amount ($10,000) must be pleaded, as it is in the instant case.

[20] And even this limitation recognizes that "settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970).

42 U.S.C. § 1983 authorizes "the party injured" to institute "an action at law, suit in equity, or other proper proceeding for redress" against "[e]very person who under color of [state law, custom or usage] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . ." The section authorizes actions against state officers to secure the Fourteenth Amendment right to acquire and enjoy property free of discrimination (*see* n.18, *supra*). § 1983 and its jurisdictional twin, 28 U.S.C. § 1343(3), were the product of "[a] pervasive sense of nationalism"[21] and were part of the post-Civil War "congressional investiture of the federal judiciary with enormously increased powers."[22]

This vast broadening of federal court jurisdiction came to a head with passage of the Act of March 3, 1875 (now 28 U.S.C. § 1331),[23] whereby

> Congress conferred upon the lower federal courts, for but the second time in their nearly century-old history, general federal-question jurisdiction subject

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[21] *Steffel v. Thompson, supra*, 415 U.S. at 463.

[22] *Zwickler v. Koota, supra*, 389 U.S. at 246. *See also District of Columbia v. Carter, supra*, 409 U.S. at 427. §§ 1983 and 1343(3) were "modeled" after § 2 of the Civil Rights Act of 1866. *Mitchum v. Foster, supra*, 407 U.S. at 238; *Lynch v. Household Finance Corp., supra*, 405 U.S. at 545n.9.

[23] 28 U.S.C. § 1331(a) gives the district courts jurisdiction of "*all* civil actions" arising "under the Constitution, laws, or treaties of the United States," where the value of the controversy, exclusive of interest or costs, is greater than $10,000. Petitioners' racial discrimination claims in the instant case "arise under" the Fourteenth Amendment, and they have alleged the requisite jurisdictional amount.

> only to a jurisdictional-amount requirement, see 28 U.S.C. §1331. With this latter enactment, the lower federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Frankfurter & Landis, The Business of the Supreme Court 65 (1928) (emphasis added).

Steffel v. Thompson, supra, 415 U.S. at 464. *See also Zwickler v. Koota, supra,* 389 U.S. at 246-47. The Court has noted "that a broad grant of jurisdiction was intended" (*id.* at n.8), and that the statute "has been regarded as the 'culmination of a movement . . . to strengthen the Federal Government against the states.' " *Lynch v. Household Finance Corp., supra,* 405 U.S. at 548 n.14.[24]

Collectively and individually, therefore, 42 U.S.C. §§1981, 1982, 1983 and 28 U.S.C. §§1331, 1343, as consistently construed by this Court and as confirmed by history, confer broad civil rights and seek to open the federal courthouse door virtually as wide as Article III permits. In particular, the legislation is designed to insure "the rights of Negroes to attack state-sanctioned segregation through the peaceful channels of the judicial process." *Palmer v. Thompson,* 403 U.S. 217, 268 (1971) (White, J., dissenting on other grounds).

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[24] The court stated in *Lynch* (405 U.S. at 548) (emphasis added):

> The 1875 Act giving the federal courts power to hear suits arising under Art. III, §2 of the Constitution was, like the Act of 1871, an *expansion* of national authority over matters that, before the Civil War, had been left to the States. . . . The Act, therefore, is "clearly . . . part of, rather than an exception to, the trend of Legislation which preceded it."

B. Standing of Affected Persons and Organizations to Present Statutory and Constitutional Claims of Racial Discrimination Should be Liberally Conferred.

As the Court observed in *Linda R.S. v. Richard D.,* 410 U.S. 614, 617n.3 (1973) and repeated in *O'Shea v. Littleton,* 414 U.S. 488, 493n.2 (1974):

> Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, *e.g., Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1, 6 (1968).

See also Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970). Congress cannot, of course, exceed the limitations of Article III,[25] but where the Court has read congressional purpose as intending to provide broadly for judicial review, it has liberally accorded standing to those alleging some actual

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[25] As the Court stated in *O'Shea* (414 U.S. at 493-94n.2):

> But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occured or is likely to occur. 42 U.S.C. §1983, in particular, provides for liability to the "party injured" in an action at law, suit in equity, or other proper proceeding for redress. Perforce, the constitutional requirement of an actual case or controversy remains. Respondents still must show actual or threatened injury of some kind to establish standing in the constitutional sense.

We do not of course, suggest that §1983 or any of the other statutes under discussion permit the Court to ignore the case-or-controversy requirement.

or potential "injury in fact" and making claims "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 152 and 153. Accordingly, the Court has generously defined standing under Title VIII of the Civil Rights Act of 1968 (*see* part IC, *supra*). And it has given broad standing status to those seeking judicial review of federal agency action under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702. *United States v. SCRAP,* 412 U.S. 669 (1973); *Barlow v. Collins,* 397 U.S. 159 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970). *Cf. Sierra Club v. Morton,* 405 U.S. 727 (1972).

As demonstrated above in Part IIA, the civil rights legislation under which petitioners are proceeding reflects this Nation's longstanding, albeit tortured and unrealized, commitment to racial equality in all aspects of daily life. More important for present purposes, the legislation is a command to the federal judiciary to hear and dispose of civil rights claims on their merits. The interests asserted by petitioners here are surely as important as those concerns which received this Court's respect in *SCRAP, Barlow, Data Processing* and *Sierra Club.* The Court's own decisions are proof of that. *Tillman v. Wheaton-Haven Recreation Ass'n, supra; Sullivan v. Little Hunting Park,* 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co., supra; Barrows v. Jackson,* 346 U.S. 249 (1953); *Hurd v. Hodge,* 334 U.S. 24 (1948); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Buchanan v. Warley,* 245 U.S. 60 (1917). The right to acquire, enjoy and dispose of property without discrimination based on race has been deemed of such importance, in fact, that in each of the last-cited cases, except *Jones* and *Shelley,* persons other than those who were the objects of discrimination

were allowed to assert the right. The right has been treated, as it must again be, as paramount. "[R]ule[s] of practice," such as standing (*Barrows v. Jackson, supra,* 346 U.S. at 257), must accommodate.

1. Non-White Petitioners

Non-White petitioners effectively allege that respondents, by policy and practice, have created "a device functionally comparable to a racially restrictive convenant . . ."[26] which "herds men into ghettos and makes their ability to buy property turn on the color of their skin. . . ."[27] They allege not that respondents have only zoned certain residential areas within Penfield for whites only *(cf. Buchanan v. Warley, supra)*, or that they have merely imposed a majority-consent requirement on residence by non-whites. *Cf. Harmon v. Tyler,* 273 U.S. 668 (1927). Their claim is that respondents have effectively zoned the entire Town of Penfield for white-only occupancy (*cf. Gomillion v. Lightfoot,* 364 U.S. 339 (1960)), thereby excluding petitioners and confining them to the economic, social and human degradation of the ghetto.

The court of appeals overlooks the essence of these allegations, criticizes petitioners for not having "any interest in land within the town or any connection with any plan to construct housing for them within the town" (Pet. App.A at 8), and, incredibly, concludes that petitioners "indicate no benefit which a judgment favorable to them would produce." (Pet. App.A at 10).[28] Seem-

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[26] *Sullivan v. Little Hunring Park, supra,* 396 U.S. at 236.

[27] *Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 443.

[28] This latter conclusion was reached, in part, through the court of appeals' construction of the prayer for relief contained in petitioners' complaint (Pet. App. A at 11), overlooking the

[footnote continued]

ingly contrary decisions[29] were distinguished on the ground that the disputes in those cases focused "on a particular project [which] assures 'concrete adverseness.' " (Pet. App.A at 9 and 10).

We are aware of no decision of this Court which would define "concrete adverseness" in terms of the possibility that someone is actually prepared to pour a foundation as soon as the way is judicially cleared. We simply do not comprehend how the vindication of Thirteenth and Fourteenth Amendment constitutional and statutory rights can be made to turn upon the availability of builders or developers or real estate brokers. For one thing, the racism under attack may be so pervasive that such third parties are unwilling, for whatever reasons, to enter the fray. *See, e.g., Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir.), *cert. denied*, 43 U.S.L.W. 3295 and 3296 (1974). Even less, then, do we see how the victims of discrimination can be required to have a "connection" with such frequently-unavailable persons and corporations, or how an "interest in land" can be prerequisite to the right to challenge race-based denials of such an interest.

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relief requested in the proposed complaint-in-intervention of petitioner Home Builders (see A. 160-63). This inquiry, in our view, is inappropriate insofar as it relates to the standing issues (*see Baker v. Carr, supra*, 392 U.S. at 208), although it may have its place, in other contexts, in connection with other concerns of equity jurisprudence. *See O'Shea v. Littleton, supra*, 414 U.S. at 499-504. But even if the inquiry were appropriate, the court of appeals' approach is too wooden. By the very nature of justice, federal courts of equity are neither bound by the extent of, nor confined to, the particular relief requested at the pleading stage. *See* Rule 54(c), Fed. R. Civ. P.; *cf.* Rule 57, Fed. R. Civ. P.

[29] E.g., *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970).

In any event, the record here is replete with allegations that various persons and organizations have attempted and are prepared to construct housing in Penfield within petitioners' means. Petitioners allege that they have sought and continue to desire such housing, which has been denied to them because of illegal discrimination. No decision of this Court to date deprives them of the right to have such claims adjudicated on the merits. Only by " 'seek[ing] ingenious analytical instruments' to avoid giving . . . congressional enactment[s] the broad scope [their] language and origins may require"[30] can such a result now be reached. More ominously, such a result, by denying standing to the objects of discrimination, would encourage suburban radial discrimination to perfect itself in the comforting hope that not even third parties will bother with the steps necessary for standing to sue.

The court below thus erects a wholly new and regressive degree-of-discrimination test for standing which circumvents the jurisdictional mandates of Congress and serves no policy embodied in Article III. If the court of appeals has its way, only those individuals who have been wrongly excluded from a particular construction project actually under consideration by a suburban jurisdiction have standing to challenge their exclusion – and then only if they have some sort of "connection" with the project. Such a test invites municipalities to discriminate totally, to refuse even to consider alternative courses of conduct; for such a test permits judicial review only of certain isolated acts of discrimination while foreclosing judicial review of more effective discriminatory patterns and practices. Much discrimination results in little standing. The Rule of Law is turned on its head.

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[30] *District of Columbia v. Carter, supra*, 409 U.S. at 432.

2. Organizational Petitioners

As we read *Sierra Club v. Morton* and *United States v. SCRAP*, the organizational petitioners quite clearly have both individual and representative standing, a contention which no doubt will be thoroughly briefed by the parties. The burden of our argument here is that these petitioners should be accorded standing on the more traditional grounds[31] of *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) and *NAACP v. Alabama*, 357 U.S. 449, 458-60 (1958): as advocates and implementers of national housing policies which are embodied in the Constitution and federal laws, and as representatives of their members who may not otherwise be able to protect their own rights.

The court of appeals rejected such standing because it found the "special circumstances" present in the *NAACP* cases absent here. Although we do not perceive any meaningful differences between the standing of a union to assert the First Amendment rights of its members (*Allee v. Medrano*, 94 S. Ct. 2191, 2202n.13 (1974); *id.* at 2207 (Burger, C.J., concurring and dissenting)) and that of organizational petitioners to assert the Thirteenth and Fourteenth Amendment constitutional and statutory rights of their members, these kinds of cases do present "special circumstances" (if that is indeed the rule). The status of these petitioners is not unlike that of the NAACP in *Button:*

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[31] We say "on the more traditional grounds" in order to take into account any distinctions which the presence of the Administrative Procedure Act in *Sierra Club* and *SCRAP* might be thought to present in connection with organizational standing questions. We do not see any such distinctions, however, and our view that the civil rights enactments involved here call for equally broad standing rules applies to organizations as well as to individuals.

> litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government . . . for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.

371 U.S. at 430. Some of the petitioners' motives may be only indirectly related to minority rights, and their interests may be substantively broader and, at the same time, geographically smaller in scope, but, having failed in their political efforts to make Penfield more receptive to housing for minority-race persons, they should not have found the courthouse door locked. We do not argue that *Button* is a perfect analogy, but the Thirteenth and Fourteenth Amendment rights which these petitioners either advocate or seek to implement should be given equivalent status. Therefore, "[w]e think petitioner[s] may assert this right on [their] own behalf, because, though a corporation, [they are] directly engaged in those activities, claimed to be constitutionally protected, which . . . [respondents' activities] would curtail." *Id.* at 428.

In addition, they should be recognized as representatives of their members whose constitutional rights "could not [or may not] be effectively vindicated except through an appropriate representative before the Court." *NAACP v. Alabama, supra*, 357 U.S. at 459. The court of appeals could see "no reason why Penfield Better Homes cannot assert its own rights as well as or better than Housing Council" (Pet. App.A at 15). But that view of the record overlooks Home Builders' allegations that it has received threats of retaliation against it and its members. More-

over, it places no strain on the imagination to envision the reluctance of individual builders to propose housing for minorities in white suburbia. *See, e.g., Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir.), *cert. denied*, 43 U.S.L.W. 3295 and 3296 (1974). Such reluctance may dissipate, in some situations, under the protective umbrella of a multi-member organization. In light of these realities, representative organizations such as these petitioners should be allowed to join in or initiate challenges to alleged racially exclusionary zoning practices, so that their members might have the Law's protection while they seek to secure its goals.

III.

THE TAXPAYER-STANDING ISSUES NEED NOT BE DECIDED

If the non-white and organizational petitioners (or either) are found to have standing, litigation of their claims on the merits will necessarily serve to protect all interests asserted by the taxpayer petitioners. In such circumstances the Court has frequently declined to decide difficult standing questions. *See, e.g., California Bankers Ass'n v. Shultz*, 416 U.S. 21, 44-45 (1974); *Doe v. Bolton*, 410 U.S. 179, 189 (1973). Such a result should obtain here.

CONCLUSION

The judgment below should be reversed and the case remanded to the court of appeals for further appropriate proceedings.

Respectfully submitted,

J. HAROLD FLANNERY
PAUL R. DIMOND
WILLIAM E. CALDWELL
Lawyers' Committee for
Civil Rights Under Law
733 - 15th Street, N.W.
Suite 520
Washington, D.C. 20005

Attorneys for
Lawyers' Committee for
Civil Rights Under Law